STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY and CITY OF WESTLAND,

Plaintiffs-Appellees,

v

SEABOARD SURETY COMPANY,

Defendant-Appellant,

and

FEDERAL INSURANCE COMPANY,

Defendant.

UNPUBLISHED
August 7, 2003

No. 235310
Wayne Circuit Court
LC No. 99-903599-CZ

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In this insurance coverage action, defendant Seaboard Surety Company[1] appeals as of right from a judgment in favor of plaintiffs Michigan Municipal Risk Management Authority (MMRMA) and the City of Westland (Westland) in the amount of $689,138.96. We reverse and remand.

This case arose when the basements of several hundred Westland homes were flooded, allegedly caused by the negligent installation of a bulkhead by contractors hired to separate Westland's storm drain and sewage drain systems. Before the start of the multi-phase project, Westland had obtained an owners and contractors protective liability insurance policy through defendant. The homeowners sued the contractors allegedly liable, and a settlement fund was created to provide recovery for all the injured homeowners. While other insurance companies contributed to the fund, defendant did not. Plaintiffs sought a judgment providing that defendant had a duty to defend and indemnify Westland, providing for Westland's emergency response

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[1] Defendant Federal Insurance Company is not a party to this appeal. Therefore, our use of the singular "defendant" refers to Seaboard Surety Company.

costs, and awarding plaintiffs costs, expenses and attorney fees. Having heard cross-motions for summary disposition pursuant to MCR 2.116(C)(10), the trial court granted summary disposition on the coverage issue in favor of plaintiffs, stating in part:

> Here there is no doubt that the coverage provisions of the policy specifically include damage resulting from "operations of designated contractor." There is no doubt that Lanzo was the designated contractor, and that the "description of the operations" was sewer and paving work. It is also undisputed that in the underlying action, plaintiff sought to hold the City of Westland responsible for basement flooding allegedly resulting from the acts of Lanzo, including but not limited to the blockage of a line. Thus, the coverage portion of the policy specifically contemplates coverage for a very specific activity, one of the major risks of which is release of sewer contents. The court agrees with defendant that certainly a sewer contractor could take other action which would trigger coverage, but it cannot seriously be disputed that when a sewer contractor is performing sewer and paving work on an existing sewer, one of the major sources of potential liability involves release of the contents of the sewer. Thus, the policy expressly provides coverage for a certain construction activity in the declaration, but according to defendant, excludes it under the general pollution exclusion. The court finds that this creates an ambiguity in the policy, which of course, did not exist in *McGuirk* [*Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347; 559 NW2d 93 (1996)], which did not concern this type of policy.

Proceedings with respect to damages followed. Ultimately, the trial court entered a final order in favor of plaintiffs in the amount of $689,138.96. This appeal ensued.

On appeal, defendant first argues that the trial court erred in finding coverage under the policy. Specifically, defendant claims that the trial court improperly refused to apply the absolute pollution exclusion in the insurance policy. Defendant contends that contrary to the trial court's holding, the existence of exclusions does not in itself create an ambiguity because they are meant to limit the scope of insurance coverage. Defendant further contends that the trial court improperly relied on the insured's "reasonable expectations" of coverage despite the unambiguous language of the policy.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Further, whether insurance policy language is clear and unambiguous is a question of law reviewed de novo. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). When interpreting an insurance policy, the court must read the policy as a whole and give meaning to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). If the policy fairly admits of only one interpretation, it is unambiguous. *Matakas v Citizens Mut Ins Co*, 202 Mich App 642, 650; 509 NW2d 898 (1993). A clear and unambiguous policy must be enforced as written. *Henderson v State Farm Fire & Casualty Co*,

460 Mich 348, 354; 596 NW2d 190 (1999). With respect to exclusionary clauses, in *Churchman, supra* at 567, our Supreme Court stated:

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [Citations omitted.]

In the present case, the insurance policy states that defendant "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." However, under the "exclusions" section, the policy does not apply to

> j. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
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> (a) At or from premises you own, rent, or occupy;
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> (b) At or from any site or location used by or for you or others for handling, storage, disposal, processing or treatment of waste;
>
> (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
>
> (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
>
> (i) if the pollutants are brought on or to the site or location in connection with such operations; or
>
> (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
>
> (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
>
> Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

In *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 353-354, 357; 559 NW2d 93 (1996), this Court analyzed an absolute pollution exclusion and held, consonant with the vast majority of courts, that it was clear and unambiguous, and thus precluded coverage. The language in the absolute pollution exclusion quoted in the *McGuirk* decision is identical to portions of the pollution exclusion in the present case. See also *McKusick*

v Travelers Indemnity Co, 246 Mich App 329, 333; 632 NW2d 525 (2001) ("The absolute pollution exclusion has been interpreted by this Court, as well as many other jurisdictions, to be clear and unambiguous in precluding coverage for claims arising from pollution.")

Here, although the flooding problem is perhaps a foreseeable situation when undertaking a sewer and paving project, the contract language, and specifically the exclusion language, are clear and unambiguous. Excluded from coverage are "bodily injury" or "property damage" resulting from the discharge of pollutants from city-owned or occupied property that is used to transport, handle, or store waste. We respectfully disagree with the trial court's conclusion that excluding a major source of potential liability from generally broad coverage creates an ambiguity in the contract even when that source of potential liability may be likely to occur in light of the nature of the activity undertaken. Rather, where the contract language is unambiguous, the exclusion merely places limitations on the otherwise broad coverage. Further, plaintiffs cannot make a credible claim that the pollution exclusion rendered coverage under the policy illusory because the policy provided coverage for many risks associated with this type of construction project other than those involving pollution.

To the extent that plaintiffs argue that the pollution exclusion does not apply to the present case because defendants failed to offer evidence indicating the homeowners' homes were flooded by a pollutant, we find their argument without merit. The policy's pollution exclusion covers the *alleged* discharge of pollutants, and the underlying complaints, which defendant attached to their motion for summary disposition, clearly alleged that the flooding consisted of pollutants. For example, the underlying complaints contained allegations describing the flooding as "sewage, pollutants, water, feces, dirt, debris, and noxious odors" from the sewer system, or "raw sewage contain[ing] water, urine, fecal matter, used toilet products, debris, dirt, noxious odors, and other organic and inorganic contaminants of unknown origin and toxicity," or "raw sewage . . . [that] contained human feces and other toxic substances." Further, the policy defines "pollutant" as "*any* solid, liquid, [or] gaseous . . . contaminant, including . . . waste" (emphasis supplied). See *McGuirk*, *supra* at 355-356. We conclude that defendant presented sufficient evidence to establish that the homes were flooded with a mixture that constitutes a pollutant under the policy. In sum, we find that the pollution exclusion is unambiguous and applicable, and thus defendant cannot be held liable. *Churchman*, *supra*.

Further, we find unavailing plaintiffs' reliance on the trial court's use of the rule of reasonable expectations.[2] Despite the clear language of the policy, the trial court applied the rule of reasonable expectations, i.e., the court considered whether the policyholder was led to a reasonable expectation of coverage by reading the policy. However, because the insurance contract, including the pollution exclusion, is clear and unambiguous, the rule of reasonable expectations is not applicable. *Wilkie v Auto-Owners Ins Co*, __ Mich __, __; 664 NW2d 776

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[2] We also find without merit plaintiffs' argument suggesting that an alternative basis to affirm the trial court's decision is that defendant did not assert any specific affirmative defenses such as the pollution exclusion. Having reviewed defendant's proffered affirmative defenses, we find that the language used in defendant's affirmative defenses was sufficient to put plaintiffs on notice that defendant would defend on the basis of the agreement, which includes the pollution exclusion at issue here.

(2003); *Geller v Farmers Ins Exchange*, 253 Mich App 664, 669; 659 NW2d 646 (2002). Indeed, our Supreme Court recently explained:

> The rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged "reasonable expectations" cannot supersede the clear language of a contract. Therefore, if this rule has any meaning, it can only be that, if there is more than one way to reasonably interpret a contract, i.e., the contract is ambiguous, and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail. However, this is saying no more than that, if a contract is ambiguous and the parties' intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer. In other words, when its application is limited to ambiguous contracts, the rule of reasonable expectations is just a surrogate for the rule of construing against the drafter. [*Wilkie, supra*.]

Having determined that the trial court erred in finding coverage, we need not address defendants' remaining issues on appeal.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra